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Supreme Court of the United States

OCTOBER TERM, 1944

No. 580

BAUER, POGUE & CO., INC. and FREDERICK R. BAUER,

Petitioners,

—against—

ADELE D. TROUNSTINE, as Ancillary Executrix of the Last Will and Testament of NORMAN S. GOLDBERGER, Deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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No.

BAUER, POGUE & CO., INC. and FREDERICK R. BAUER,

Petitioners,

—against—

ADELE D. TROUNSTINE, as Ancillary Executrix of the Last Will and Testament of NORMAN S. GOLDBERGER, Deceased,

Respondent.

PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Jurisdictional Statement.

The jurisdiction of this Honorable Court is invoked under Section 240(a) of the Judicial Code, as amended, 28 U. S. C. Section 347, and Supreme Court Rule 38, par. 5(b).

Summary Statement.

Petitioners, Bauer, Pogue & Co., Inc. and Frederick R. Bauer, by their counsel, pray that a writ of certiorari issue to review a decision of the United States Circuit Court of Appeals for the Second Circuit, rendered August 1, 1944, in an action entitled *Adele D. Trounstine, as Ancillary Executrix of the Last Will and Testament of Norman S. Goldberger, deceased,* Plaintiff-Appellee-Appellant, against *Bauer,*

Pogue & Co., Inc. and Frederick R. Bauer, Defendants-Appellants-Appellees, and *Donald R. Arrowsmith, as Executor of the Last Will and Testament of Davenport Pogue, deceased,* Defendant, Docket #371, affirming, without costs to either party, a final decree of the District Court of the United States for the Southern District of New York, which awarded respondent a recovery of $101,707.07 (R. 352-4, 455).

This is an action for an accounting between parties to a joint adventure to trade in stock, carried on in 1933 between plaintiff's testator and the corporate defendant, Bauer, Pogue & Co., Inc. The action was instituted against the president of the corporate defendant as well, on the theory that he knowingly joined in a breach of trust by the corporate defendant.

The action was begun in June, 1939 in the New York Supreme Court. It was removed to the Federal Court on the ground of diverse citizenship.

The controversy between the parties was as to terms of the agreement for the joint adventure and the date when it was to begin. The amended complaint alleged two causes of action: one based on an oral agreement alleged to have been made on or about June 8, 1933 to begin the joint adventure on June 8, 1933, the other based on an alleged written agreement dated June 9, 1933 to begin the joint adventure on the execution of the written agreement. Defendants, petitioners herein, contended that the agreement for the joint adventure was not made until June 13, 1933, and that the joint adventure began then and not before and that it was conducted under an agreement differing substantially from the two alleged by plaintiff.

Plaintiff's counsel conceded at the trial and in their briefs on appeal that the joint adventure was not conducted pursuant to the oral agreement of June 8, 1933 alleged in the amended complaint. The written agreement of June 9, 1933

alleged in the amended complaint was never executed by all the parties.

The Trial Court, nevertheless, found in spite of the concession of plaintiff's counsel and without any testimony whatsoever that the joint adventure was conducted pursuant to an oral agreement of June 8, 1933 and that the joint adventure began that day (R. 437, 438). The Circuit Court of Appeals for the Second Circuit affirmed (R. 438).

In so holding, the Courts below ignored contemporaneous written admissions of plaintiff's testator and his attorney at the time as well as admissions of plaintiff's counsel at the trial, directly contradicting such finding (R. 109, 229, 230, 285, 286, 333, 339).

No witness testified to the fact of the oral agreement of June 8, 1933 under which the Courts below found the joint adventure was conducted or of the knowledge of the individual defendant of the existence and breach of any such agreement. The Courts below rested their finding that the joint adventure was conducted under the *oral* agreement of June 8, 1933, on alleged admissions in the form of entries under date of June 8, 1933 to the credit of a joint account made in the corporate defendant's secondary books of account by a former employee who had been imprisoned for embezzlement and falsification of its books.

Defendants were not permitted to offer any testimony of what the actual transaction between plaintiff's testator and the corporate defendant was, which would show that the entries in the books were incorrect, explain those alleged admissions, show that the fraud charges made by plaintiff were wholly unjustified and that the individual defendant had no knowledge of any agreement other than the one the defendant corporation did make with plaintiff's testator, *i.e.*, the one made on June 13, 1933, and therefore, could not have knowingly participated in a breach of any other agreement such as that of June 8, 1933 found by the Court. The

Courts refused to receive such testimony on the ground that the New York "dead man's" statute, §347 of the New York Civil Practice Act (printed as Appendix D to Petitioner's Brief, p. 30 hereof) was applicable. This barred testimony, if it had been received, would have resulted in a decision of this action in favor of defendants. Plaintiff's counsel, who was familiar with the testimony after taking the deposition of the individual defendant, told the Trial Court that it was decisive of the case (R. 243).

Prior to the commencement of this action and in 1937 the corporate defendant had been dissolved in Delaware (R. 439). Under the laws of Delaware then in effect (printed as Appendix E to Petitioner's Brief, p. 32 hereof), its existence was continued for certain limited purposes for three years after its dissolution. That three year period expired in 1940 before the trial herein and before the law was amended in 1941 (R. 439). The corporate defendant had theretofore been authorized to do business in New York (R. 299). The Trial Court found that the corporate defendant was dead in Delaware but that its existence nevertheless continued in New York on the theory that when it acquired the right to do business in New York it contracted with the Statute of New York that its existence should continue in New York until all liabilities which arose there had been satisfied (R. 300). The Circuit Court of Appeals approved the Trial Court's ruling (R. 440).

A petition for rehearing was duly filed (R. 443). The petition was denied on August 29, 1944 (R. 454).

Questions Presented.

1. Whether the Federal Court in a civil action must refuse to receive testimony which under the "dead man's" statute of the forum-state would be inadmissible in a state court?

2. Whether Rule 43(a) of the Federal Rules of Civil Procedure, 28 USCA following §723c (printed as Appendix A to Petitioner's Brief, p. 29 hereof), has supplanted the Competency of Witnesses Act, R. S. §858, 28 USCA §631 (printed as Appendix C to Petitioner's Brief, p. 30 hereof), which provides that the competency of a witness in the Federal Courts shall be determined by the laws of the State in which the Court is held?

3. Where a case is brought on two causes of action: one based on an oral agreement and the other on a written, and the existence of either agreement is denied by defendants, do counsel for plaintiff by statements at the trial admitting that there was no oral agreement and contending that the agreement was a written agreement, remove from the case the cause of action on the oral agreement, so that the Courts below were not warranted in finding that there was an oral agreement?

4. Does a dissolved corporation whose existence, at least in actions begun against it, has terminated under the laws of the state of its incorporation, nevertheless continue to exist in a foreign forum-state because in theretofore qualifying to do business in the foreign state, it had designated the Secretary of State of the foreign state to accept service of process upon it in actions against it?

Reasons Relied On for the Allowance of Writ.

Reason I: The Circuit Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court.

(a) The question here involved, whether the Federal Courts must hold that evidence which is inadmissible in the state courts under a forum-state statute is like-

wise inadmissible in the Federal Courts since the adoption of Rule 43(a) of the Federal Rules of Civil Procedure, has never previously been passed upon by this Court.

(b) The importance of the question and the necessity for final determination by this Court is indicated by the following:

(1) The history of the Rule shows a desire by the framers of the Rule to modernize and liberalize the rules of evidence to permit Federal Courts the greatest possible liberality in the admission of evidence.

(2) The fact that the decision of the Circuit Court of Appeals defeats the purpose of the Rule by compelling the Federal Courts in applying rules of evidence to follow state statutes which do not favor the reception of evidence and ignores the specific statement in Rule 43(a) that "in any case, the statute or rule which favors the reception of evidence governs".

Reason II: The decision of the Circuit Court of Appeals is not in the spirit of this Court's decision in *Funk* v. *United States,* 290 U. S. 371, 78 L. ed. 369, which discloses a policy favoring competency of witnesses in accordance with modern trends of reform favoring the admissibility of all evidence.

Reason III: The decision of the Circuit Court of Appeals is in conflict with "the new policy envisaged in the enabling act of 1934 * * * that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth." *Sibbach* v. *Wilson & Co.,* 312 U. S. 1, 14, 85 L. ed. 479, 485.

Reason IV: The decision of the Circuit Court of Appeals in requiring a forum-state "dead man's" statute to be enforced in the Federal Courts to prevent the successful development of the truth, follows an outworn and antiquated rule of the past, a rule which has been severely criticised and termed an instrument of injustice.

2 *Wigmore, Evidence,* 3d ed. (1940), §§578, 578a, 5 id. §1576;

Report of Section of Judicial Administration, 63 American Bar Association Reports 581, 597;

American Law Institute Model Code of Evidence, p. 16 and discussion under Rule 101;

Morgan, et al., The Law of Evidence; Some Proposals for Its Reform, 1927, 24-34;

Taft, Comments on Will Contests in New York, 30 Yale Law Journal 593, 605;

Ladd, Admission of Evidence Against Estates of Deceased Persons, 19 Iowa Law Review 521;

Ladd, The Dead Man Statute: Some Further Observations and a Legislative Proposal, 26 Iowa Law Review 207, 229-240;

Callahan and Ferguson, Evidence and the New Federal Rules of Civil Procedure: 2, 47 Yale Law Journal 194, 198; 45 Yale Law Journal 622, 632;

Zechariah Chafee, Jr., "The Progress of the Law, 1919-1922," 35 Harvard Law Review 673, 680;

Rowley, The Competency of Witnesses, 24 Iowa Law Review 482, 491;

Goodman, The "From, Through or Under" Rule as to Competency of Witnesses, 9 Fordham Law Review 65.

Reason V: The public interest will be promoted by prompt settlement in this Court of the questions involved.

Although the precise question of the interpretation of Rule 43(a) of the Federal Rules of Civil Procedure has not come before this Court, it has been raised by at least two authorities on the law of evidence.

> 1 *Wigmore, Evidence,* 3d ed. (1940), §6c, p. 199; *Green, Evidence and the Federal Rules,* 55 Harvard Law Review 197, 224.

Reason VI: It has been held by the New York Court of Appeals that as a matter of equity and justice, the New York "dead man's" statute does not abrogate the principle of evidence that where a party examines a witness as to part of a transaction, the other party may examine him as to the balance. *Nay* v. *Curley,* 113 N. Y. 575, 578, 579. As a matter of equity and justice, should not the principle of evidence apply in the Federal courts, if not in the State courts as well, that where a party offers as an admission, a hearsay statement of a defendant relating to part of a transaction, the other party may show the balance of the transaction? For example, if A under duress by B admits in writing an indebtedness to B, which did not in fact exist, and if B then flees and is killed, under the decision herein B's executor could sue A successfully on the admission and bar A from showing that it was an involuntary admission and that there was in fact no indebtedness. In this case, records of the corporate defendant were changed by a dishonest employee who was thereafter imprisoned. These falsified records were then offered by the executrix herein as admissions of defendants in support of her claim. The executrix by invoking the "dead man's" statute, then prevented defendants from showing that the records were not correct. If this action had been brought in New Jersey where plaintiff's testator resided or in Connecticut, where

the individual defendant resided, the barred testimony would have been received.

New Jersey R. S. 2:97-2;
Newman v. *Fantl,* Ct. of Er. and Ap., 119 N. J., Eq. 351, 355;
Connecticut General Statutes, 1930 §5582.

Reason VII: The decisions of the Courts below in finding that the joint adventure was carried on under an oral agreement despite the fact that plaintiff's counsel at the trial and in an affidavit after the trial and in their briefs on appeal admitted that there was no oral agreement and contended that there was a written agreement, is in conflict with the decision of the Circuit Court of Appeals for the Sixth Circuit in *Lenox Clothes Shop, Inc.* v. *Commissioner of Internal Revenue,* 139 F. 2d 56, 60, that admissions and stipulations of counsel during the trial of a case remove from the case any issue as to the subject matter of the admissions and stipulations.

Reason VIII: The decisions of the Courts below in holding that a dissolved corporation whose existence has terminated under the laws of the state of its incorporation, nevertheless continues to exist in a foreign state because it had, prior to its dissolution, designated the Secretary of State of the foreign state to accept service of process on its behalf in actions against it, is in conflict with the decision of this Court in *Oklahoma Natural Gas Company* v. *Oklahoma,* 273 U. S. 257, 71 L. ed. 634, that the dissolution of a corporation cannot be distinguished from the death of a natural person in its effect and that the dissolution abates all litigation to which the dissolved corporation is a party, unless its existence is continued by the law of the state of

incorporation for the purpose of prosecuting and defending suits.

Reason IX: The decision of the Courts below on the question of the continued existence of the dissolved corporation is likewise in conflict with the decisions of the New York Court of Appeals in *Matter of National Surety Co. (Laughlin)*, 283 N. Y. 68, 77, certiorari denied, 311 U. S. 707, 85 L. ed. 459, and the decision of the Circuit Court of Appeals for the Fifth Circuit in another case involving the National Surety Company, *National Surety Company of New York* v. *Cobb*, 66 F. 2d 323, certiorari denied, 290 U. S. 693, 78 L. ed. 595, holding that the designation of the Secretary of State was analogous to a power of attorney granted by an individual, which ceased upon the death of the individual.

WHEREFORE your petitioners pray that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Second Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record of the proceedings of the said Circuit Court had in the case numbered and entitled on its docket, No. 371, *Adele D. Trounstine, as Ancillary Executrix of the Last Will and Testament of Norman S. Goldberger, deceased,* Plaintiff-Appellee-Appellant, against *Bauer, Pogue & Co. Inc. and Frederick R. Bauer,* Defendants-Appellants-Appellees, and *Donald F. Arrowsmith, as Executor of the Last Will and Testament of Davenport Pogue, deceased,* Defendant, to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States; and that the judgment herein of the said Circuit Court of Appeals be reversed by the Court and your petitioners pray that the certified copy of the

record and proceedings of the Circuit Court of Appeals for the Second Circuit filed with this petition, may be treated as a return to said writ of certiorari and your petitioners pray that they may have such other and further remedies in the premises as to the Court may seem appropriate and in conformity with law.

Dated, New York, New York, October 10, 1944.

BENJAMIN P. DEWITT,
Counsel for Petitioners.

SIDNEY PEPPER,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM, 1944

No.

BAUER, POGUE & CO., INC. and FREDERICK R. BAUER,

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—against—

ADELE D. TROUNSTINE, as Ancillary Executrix of the Last Will and Testament of NORMAN S. GOLDBERGER, Deceased,

Respondent.

BRIEF FOR PETITIONERS

Opinions Below.

The opinion of the District Court is officially reported at 44 F. Supp. 767 and is printed in the Record (R. 296). The opinion of the Circuit Court of Appeals, filed August 1, 1944, is not yet officially reported but is printed in the Record (R. 435).

Basis for Jurisdiction.

The statement showing the grounds upon which jurisdiction of this Court is invoked is set forth at page 1 of the foregoing petition, and is, by reference, adopted as part of this brief.

The Federal Rule of Civil Procedure and Statutes Involved.

The Rule directly involved is Rule 43(a) of the Rules of Civil Procedure, 28 USCA following §723c and is printed as Appendix A hereto (p. 29 hereof).

The specific portion of the Rule more particularly involved is the construction of the last sentence in the following language of the Rule:

> "All evidence shall be admitted which is admissible under the statutes of the United States, or under the rules of evidence heretofore applied in the courts of the United States on the hearing of suits in equity, or under the rules of evidence applied in the courts of general jurisdiction of the state in which the United States court is held. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner."

The Act of June 19, 1934, the Enabling Act, c. 651, §1, 48 Stat. 1064, 28 USCA §723b, which authorized the Court to prescribe the Rules, provided: " * * * all laws in conflict therewith (the rules) shall be of no further force or effect". The Enabling Act is printed as Appendix B hereto (p. 29 hereof).

The Competency of Witnesses Act (R. S. §858) is printed as Appendix C hereto (p. 30 hereof).

The New York "dead man's" statute, §347 of the Civil Practice Act, is printed as Appendix D hereto (p. 30 hereof).

The Delaware Statute, Revised Code, 1935, §2074, is printed as Appendix E hereto (p. 32 hereof).

Statement.

The material facts have been set forth in the Summary Statement at pages 1 to 4 of the preceding Petition and such statement is, by reference, adopted as part of this brief.

ARGUMENT.

POINT I.

The Circuit Court of Appeals has decided an important question with respect to the interpretation of Rule 43(a) of the Federal Rules of Civil Procedure, which has not been but should be settled by this Court.

A. ***This Court has not previously passed upon Rule 43(a).***

The questions here involved relating to Rule 43(a) of the Federal Rules of Civil Procedure, namely, whether a Federal Court must, under the Rule, refuse to receive testimony which under the "dead man's" statute of the forum-state would be inadmissible in a state court and whether the Rule has supplanted the Competency of Witnesses Act so that the Federal Courts are now no longer required to follow the laws of the forum-state on competency, but are free to admit any evidence that the Federal Court thinks ought to be admitted, have not only not been passed upon by this Court, but have not been previously determined by any Federal Court.

> "No opinion has been found which showed a grasp of the rule [Rule 43(a)]".
>
> *Green, Evidence and the Federal Rules,* 55 Harvard Law Review 197, 224, *supra.*